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9 IN THE UNITED STATES DISTRICT COURT

10 FOR THE DISTRICT OF OREGON

11 JEFFREY CREE,)

12 Plaintiff,)

13 v.)

14 CO A. JOHNSON,)

15 Defendant.)
16

No. CV-04-893-HU

FINDINGS & RECOMMENDATION

17 Jeffrey Cree
18 SID # 5695034
19 Oregon State Penitentiary
20 2605 State Street
21 Salem, Oregon 97310-0505

22 Plaintiff Pro Se

23 Hardy Myers
24 ATTORNEY GENERAL
25 Leonard W. Williamson
26 SENIOR ASSISTANT ATTORNEY GENERAL
27 Department of Justice
28 1162 Court Street NE
Salem, Oregon 97301-4096

Attorney for Defendant

HUBEL, Magistrate Judge:

Plaintiff Jeffrey Cree, an inmate at Oregon State Penitentiary (OSP), brings this action against defendant Correctional Officer

1 - FINDINGS & RECOMMENDATION

1 Aaron Johnson, alleging religious discrimination in violation of
2 the First Amendment and the Religious Land Use and
3 Institutionalized Persons Act (RLUIPA). Defendant moves to dismiss
4 for failure to exhaust administrative remedies, or alternatively
5 for summary judgment. I recommend that the motion to dismiss be
6 granted. I do not consider the alternative summary judgment
7 motion.

8 BACKGROUND

9 Plaintiff is a Native American and member of the Lakota Oyate
10 Ki Culture Club at OSP. In his Complaint, he alleges that during
11 a search of his cell on August 28, 2003, Johnson seized, disturbed,
12 or desecrated various items of religious significance, including a
13 medicine bag and eagle feathers, and that the search was intended
14 to harass plaintiff for his religious beliefs and to keep plaintiff
15 from attending a Native American pow-wow. Compl. at ¶¶ 27, 39, 40.

16 As a result of other contraband items discovered during the
17 search, Johnson issued a misconduct report to plaintiff. Id. at ¶
18 42. After a hearing on the misconduct report, plaintiff was
19 issued seven days in disciplinary segregation, which was suspended,
20 and fourteen days loss of privileges, causing him to miss the pow-
21 wow. Id. at ¶¶ 43-45.

22 Plaintiff also alleges that Johnson later confiscated eagle
23 feathers and other items in retaliation for plaintiff's earlier
24 conflict with him. Id. at ¶¶ 47-48. This alleged confiscation
25 apparently occurred during another search of plaintiff's cell,
26 which produced a second misconduct report. Id. at ¶¶ 49.
27 Plaintiff received a seven-day disciplinary segregation sanction
28 and another fourteen days of lost privileges as a result. Id. at

¶¶ 49-50.

On or about September 13, 2003, plaintiff filed an internal discrimination complaint against Johnson, alleging that his actions violated Oregon Department of Corrections (ODOC) policy by searching plaintiff's medicine bag and handling the eagle feathers. Id. at ¶ 54. He further alleged that defendant disrespected Native American religious beliefs because of a prejudice defendant allegedly possesses against Native American culture. Id. Plaintiff requested that Johnson be reassigned to an area where he would not interact with inmates. Exh. 2 to Affid. of Michael Dodson.

On or about September 19, 2003, OSP Superintendent Brian Belleque sent plaintiff a response to the discrimination complaint in which Belleque explained that following the investigation of plaintiff's claim, Belleque concluded that plaintiff's medicine bag was handled inappropriately when Johnson, outside of plaintiff's presence, dumped out the contents of the bag, inspected it, and replaced the contents into the bag. Compl. at ¶ 55. Belleque acknowledged that a training issue existed regarding the proper procedure in which to handle Native American medicine bags and eagle feathers. Id. He did not reassign Johnson. Id.

Apparently unsatisfied with Belleque's response, plaintiff filed this lawsuit.

STANDARDS

A motion to dismiss for failure to exhaust administrative remedies under the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), is to be treated as an "unenumerated Rule 12(b) motion rather than a motion for summary judgment." Wyatt v. Terhune, 315

1 F.3d 1108, 1119 (9th Cir.), cert. denied, 540 U.S. 810 (2003). "In
2 deciding a motion to dismiss for failure to exhaust nonjudicial
3 remedies, the court may look beyond the pleadings and decide
4 disputed issues of fact." Id. at 1119-20.

5 DISCUSSION

6 Section 1997e(a) provides that

7 [n]o action shall be brought with respect to prison
8 conditions under section 1983 of this title, or any other
9 Federal law, by a prisoner confined in any jail, prison,
or other correctional facility until such administrative
remedies as are available are exhausted.

10 42 U.S.C. § 1997e(a).

11 "[T]he PLRA's exhaustion requirement applies to all suits
12 about prison life, whether they involve general circumstances or
13 particular episodes, and whether they allege excessive force or
14 some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002).

15 The statute requires that an inmate exhaust administrative
16 remedies before the filing of a complaint. McKinney v. Carey, 311
17 F.3d 1198, 1199 (9th Cir. 2002). Exhausting available remedies
18 during the course of litigation does not comply with the statute.
19 Id. Additionally, exhaustion is required regardless of the relief
20 offered through administrative procedures. Booth v. Churner, 532
21 U.S. 731, 741 (2001).

22 By its own language, section 1997e(a) makes clear that it
23 applies to both of plaintiff's claims as it states that it governs
24 claims brought under section 1983 as well as any other federal law.
25 This is reinforced by the RLUIPA itself which expressly provides
26 that "[n]othing in [the RLUIPA] shall be construed to amend or
27 repeal the Prison Litigation Reform Act[.]" 42 U.S.C. § 2000cc-
28 2(e). Given the Supreme Court's interpretation of the statutory

1 phrase "prison conditions" to include all "all suits about prison
2 life," there is no question that the exhaustion requirement applies
3 equally to the section 1983 and RLUIPA claims plaintiff raises.

4 The undisputed facts in the record show that plaintiff
5 initiated an administrative complaint regarding the alleged
6 religious discrimination against him by Johnson in early September
7 2003. Exh. 2 to Dodson Affid. The record also shows that
8 plaintiff received Belleque's response to that complaint on or
9 about September 19, 2003. Exh. 3 to Dodson Affid.

10 Belleque's response informs plaintiff that he was entitled to
11 further review of his discrimination complaint by the Inmate
12 Discrimination Appeals Committee (IDAC) by communicating a request
13 for such review to Michael Dodson, an ODOC Investigator at OSP.
14 Id. Plaintiff was also informed that should he have any new
15 information regarding the complaint, he should also provide that to
16 Dodson. Id. Belleque indicated that after initiating the review
17 request with Dodson, Dodson would forward the original
18 discrimination complaint, the response, and any new information, to
19 the IDAC, which would then issue a response within ninety days.
20 Id. Plaintiff does not dispute that he received Belleque's
21 response to his discrimination complaint containing this
22 information.

23 Under relevant ODOC rules for discrimination complaints by
24 inmates, plaintiff was entitled to a review of the initial decision
25 on his complaint, by a person or other entity, not under the
26 supervision or control of the functional unit to which the inmate
27 is assigned. Or. Admin. R (OAR) 291-006-0015(2)(c). The review of
28 the initial decision is to be processed within ninety days and the

1 results provided to the complainant in writing. Id.

2 Dodson states that plaintiff never appealed Belleque's
3 decision regarding plaintiff's discrimination complaint to the
4 IDAC. Dodson Affid. at ¶ 9. Plaintiff offers no contrary
5 evidence. By failing to appeal the decision, plaintiff failed to
6 exhaust his administrative remedies and thus, did not comply with
7 the PLRA's exhaustion requirement.

8 Additionally, although discrimination complaints are handled
9 through the specific rules applicable to that type of complaint,
10 OAR 291-006-0005 through OAR 291-006-0025, the more general ODOC
11 Inmate Grievance Review System also afforded plaintiff another
12 avenue for appeal of Belleque's decision. Id. at ¶ 10. According
13 to Dodson, plaintiff failed to take an available appeal review from
14 Belleque's decision under the grievance system. Id. Again,
15 plaintiff offers no contrary evidence. By failing to appeal
16 through this route, plaintiff failed to comply with the PLRA's
17 exhaustion requirement.

18 When "the prisoner has not exhausted nonjudicial remedies, the
19 proper remedy is dismissal of the claim without prejudice." Wyatt,
20 315 F.3d at 1120.

21 CONCLUSION

22 I recommend that defendant's motion to dismiss (#17) be
23 granted, that the Complaint be dismissed without prejudice, and a
24 judgment in defendant's favor be entered.

25 SCHEDULING ORDER

26 The above Findings and Recommendation will be referred to a
27 United States District Judge for review. Objections, if any, are
28 due October 5, 2005. If no objections are filed, review of the

1 Findings and Recommendation will go under advisement on that date.

2 If objections are filed, a response to the objections is due
3 October 19, 2005, and the review of the Findings and Recommendation
4 will go under advisement on that date.

5 IT IS SO ORDERED.

6 Dated this 20th day of September, 2005.

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9 /s/ Dennis James Hubel
10 Dennis James Hubel
United States Magistrate Judge
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